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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to	)	ET Docket No. 97-99
Relocate the Digital Electronic Message	)	
Service from the 18 GHz Band to the	)	
24 GHz Band and to Allocate the	)	
24 GHz Band for Fixed Service	)	

To: The Commission

BELLSOUTH REPLY

BELLSOUTH CORPORATION

L. Andrew Tollin
Michael Deuel Sullivan
Craig E. Gilmore
Jennifer Ann Burton
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Ave., N.W.
Washington, D.C. 20006
(202) 783-4141

William B. Barfield
Jim O. Llewellyn
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610
(404) 249-4445

David G. Frolio
BELLSOUTH CORPORATION
1133 21st Street, N.W., Suite 900
Washington, D.C. 20036
(202) 463-4132

Its Attorneys

July 23, 1997

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To: The Commission

BELLSOUTH REPLY

BellSouth Corporation ("BellSouth"), by its attorneys, hereby replies to the oppositions[1] submitted in response to petitions for reconsideration, partial reconsideration and clarification[2] of the Commission's *24 GHz Order*[3] in this matter.

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[1] Teledesic Corporation ("Teledesic") Consolidated Opposition to Petitions for Reconsideration (filed July 8, 1997) ("Teledesic Opposition"); Digital Services Corp., Microwave Services, Inc., and Teligent, L.L.C. (formerly Associated Communications, L.L.P.) (collectively, "Teligent") Opposition to Petitions for Reconsideration, Partial Reconsideration, and Clarification ("Teligent Opposition").

[2] BellSouth Petition for Reconsideration (filed June 5, 1997); Petition for Reconsideration of DIRECTV Enterprises, Inc. (filed June 5, 1997) ("DIRECTV Petition"); Petition for Partial Reconsideration of the Millimeter Wave Carrier Association, Inc. (filed June 5, 1997) ("MWCA Petition"); WebCel Communications, Inc. Petition for Reconsideration (filed June 5, 1997) ("WebCel Petition"); and Petition for Clarification of WinStar Communications, Inc. (filed June 5, 1997).

[3] *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band For Fixed Service,* ET Docket No. 97-99, *Order,* 12 F.C.C.R. 3471 (1997) (*"24 GHz Order" or "Order"*).

SUMMARY

In its petition for reconsideration, BellSouth established that the *24 GHz Order* violated the APA's inviolable public notice and comment requirements and must be vacated.[4] BellSouth further demonstrated that the relocation of incumbent DEMS licensees to the 24 GHz band would violate the competitive bidding mandate set forth in Section 309(j) of the Communications Act.[5] The oppositions fail to establish any vital national security interests to justify the Commission's decision to reassign large amounts of public spectrum to private parties without an auction. Indeed, since BellSouth initially filed its petition for reconsideration on June 5, 1997, evidence supporting its position has surfaced (i) in testimony before Congress by the head of NTIA and (ii) in the recent release of *ex parte* notices evidencing private party meetings with the Commission more than six months ago, neither of which have been mentioned in the oppositions.[6] Moreover, the oppositions' reliance on *Bendix Aviation Corp. v. FCC* as the authoritative case in this area is misplaced. The Commission's invocation of the "military function" exception to resolve behind closed doors a

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[4] BellSouth Petition for Reconsideration at 5-13.

[5] *Id.* at 16-20. By adopting *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band For Fixed Service*, DA 97-1285, *Order*, (June 24, 1997) ("*Modification Order*"), the Commission modified 18 GHz DEMS licenses for use on the 24 GHz band. BellSouth filed a "Petition for Reconsideration" of this decision on July 18, 1997, requesting that the Commission vacate the *Modification Order*, or freeze the effect of that order at a minimum until the Commission can rule on the petitions for reconsideration and clarification of the *24 GHz Order*.

[6] *See* Reauthorization of the National Telecommunications and Information Administration, 1997: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 105th Cong., 1st Sess. 77-79 (1997) (statement of Larry Irving, Assistant Secretary for Communications for the National Telecommunications and Information Administration) ("Irving Testimony"); *see also infra* text accompanying notes 21-23. As of July 22, 1997, this testimony has not yet been released to the general public through the Government Printing Office ("GPO"). Although GPO printed an advance copy for the Subcommittee on Telecommunications around June 28, 1997, it only became available to BellSouth on July 8, 1997. The GPO anticipates a public release in the near future.

private spectrum dispute and to award valuable and scarce public spectrum without an auction was not proper.

I. THE *24 GHZ ORDER* VIOLATES SECTION 553 OF THE ADMINISTRATIVE PROCEDURE ACT AND MUST BE VACATED

The *Order* at issue here states "we implement changes to our rules . . . without notice and comment procedures. . . . in the interests of national security."[7] Section 553 of the Administrative Procedure Act ("APA") generally guarantees the public an opportunity to participate in the rule making process, "except to the extent . . . a military or foreign affairs function of the United States" is involved.[8] In its petition for reconsideration, BellSouth argued, *inter alia,* that the Commission's swift and unilateral decision to relocate DEMS licensees from the 17.8-20.2 GHz band ("18 GHz band") to the 24.25-24.45 GHz and 25.05-25.25 GHz bands ("24 GHz band"), along with its simultaneous release of an *Order and Authorization*[9] permitting Teledesic to construct, launch, and operate an international satellite system on the 18 GHz band without notice and comment, appeared to have been driven more by the Commission's desire to aid the spectrum needs of Teledesic and Teligent and to avoid the need to auction valuable government resources rather than to address national security spectrum needs of the Department of Defense ("DoD").[10] The *24 GHz Order* was issued without following the APA's notice and comment procedures and did not fall within the

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[7] *24 GHz Order*, 12 F.C.C.R. at 3475; *see also id.* at 3478 (citing the "military affairs exception" in Section 553(a)(1) of the APA).

[8] 5 U.S.C. § 553(a)(1); *see* U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 26 (1947).

[9] *In the Matter of Teledesic Corporation Application for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the Domestic and International FIXED Satellite Service*, 12 F.C.C.R. 3154 (1997) ("*Order and Authorization*").

[10] BellSouth Petition at 13-16; *see also* DIRECTV Petition at 16-17, 20; MWCA Petition at 17; WebCel Petition at 16.

APA's "military affairs" exception. Thus, the *Order* must be vacated.[11] Timely action on BellSouth's petition is required because the FCC has continued to move ahead by modifying the licenses of those authorized to operate a DEMS service on the 18 GHz band so that those licensees may relocate to the 24 GHz band.[12]

A. Testimony of Larry Irving, NTIA Assistant Secretary for Communications and Information, Confirms that the DEMS Reallocation Does Not Fall Within the APA's Military Affairs Exception

Teligent and Teledesic assert that petitioners "distorted" the story behind the Commission's *24 GHz Order*.[13] Throughout their pleadings, Teligent and Teledesic repeatedly assert that the prime mover of the *24 GHz Order* was either the NTIA, or the NTIA acting on behalf of the DoD.[14] For example, Teledesic argues, and Teligent concurs:

> *The Executive Branch asked the FCC to do exactly what it did, exactly the way it did it, for national security reasons.* This fact, documented in the record by two separate requests from NTIA [the National Telecommunications and Information Administration], makes clear the [*24 GHz Order*] falls comfortably within the statutory exemption for cases in which "there is involved . . . a military or foreign affairs function of the United States."[15]

Similarly, Teligent asserts that when the FCC was "confronted by demands from the Executive to relocate DEMS," the Commission undertook to do "whatever was reasonably open to it in the light

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11 BellSouth Petition for Reconsideration at 5-16.

12 *Modification Order,* DA 97-1285 (June 24, 1997); *see supra*, n.5.

13 Teledesic Opposition at 2.

14 Teligent claims to be "merely an incidental beneficiary of the DEMS relocation." Teligent Opposition at 20.

15 Teledesic Opposition at 2 (*citing* the Administrative Procedure Act's "military affairs" exception to public notice and comment procedures, 5 U.S.C. § 553(a)); *see also* Teligent Opposition at 2, 8-9.

of national defense needs "[16] Teligent also states that "[n]o one, including the DEMS licensees and the Petitioners, is qualified to second-guess NTIA's (or the Defense Department's) determination."[17]

The oppositions further describe a scenario whereby the NTIA approached the Commission "on behalf"[18] of the DoD "in order to resolve national security concerns about interference with government operations in the 18 GHz band."[19] According to the oppositions, a letter from the NTIA to the FCC dated January 7, 1997,[20] termed the NTIA First Request by Teledesic, "made clear in [the] very first paragraph that NTIA was asking the FCC" to protect two government earth stations and to "*expeditiously* undertake any *other necessary actions,* such as amending the Commission's rules and modifying Commission issued licenses." That letter also "offered to vacate 24 GHz spectrum used by the Government so that the Commission could use that spectrum to solve the national security problem created by DEMS interference."[21]

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16 Teligent Opposition at 13 (internal quotations omitted).

17 *Id.* at 2.

18 "The Commission effected the relocation without public notice and comment [for the] NTIA acting on behalf of the Department of Defense." Teligent Opposition at 2; *see also* Teledesic Opposition at 7 ("the Commission properly acceded to NTIA's request that DEMS be relocated to 24 GHz in the interest of national security"); Teligent Opposition at 8 ("[t]he [*24 GHz Order*] accommodates the national security concerns of the NTIA and the Department of Defense"); Teledesic Opposition at 10 ("the Commission implemented [a] course[] of action proposed by the Executive branch in order to protect national security interests").

19 Teledesic Opposition at Summary; Teligent Opposition at 2.

20 Letter from Richard D. Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, at 1 (Jan. 7, 1997) (cited in Teledesic Opposition at 3-5).

21 *Id.*; Teligent Opposition at 8. The oppositions also cite a second NTIA letter (the NTIA Second Request), arguing that "NTIA made a *second* request offer[ing] a detailed . . . approach [for solving potential interference problems] which assumed that DEMS would be relocated . . . nationwide." *See* Teledesic Opposition at 5-6 (*citing* Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC (Mar. 5, 1997)); *see also* Teligent Opposition at 3, 17.

On April 24, 1997, however, Larry Irving, the Assistant Secretary for Communications and Information at NTIA, testified before the Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce, U.S. House of Representatives.[22] Mr. Irving's testimony demonstrates very clearly that the proposal to relocate the DEMS licensees was initiated by the FCC rather than NTIA or DoD. Specifically, Mr. Irving testified in response to questions from Representative Steve Largent (R-OK), member of the House of Representatives, Subcommittee on Telecommunications, Trade, and Consumer Protection as follows:

> MR. LARGENT. I wanted to talk to you about a situation that the NTIA was involved in, and I assume you were involved, the digital electronic messaging service, and the 24 gigahertz band where there was some shifting of the allocation of the spectrum. *It is a little bit confusing to me how that came about and the security—national security interests that were raised as a rationale for doing that. You have two companies. One had spectrum that was going to be—they were fearful it was going to be impeded upon and so all of a sudden, the NTIA comes up and says, hey, we happen to have some spectrum available over here; we can accommodate everybody. The FCC followed suit. There was no opportunity for public comment or anything else, and I am just wondering, can you enlighten this committee on that?*
>
> MR. IRVING. It wasn't particularly sinister. *You had some competing uses and they couldn't both fit in the same area.* The laws of physics are such that you can't always put certain technologies in the same band without interfering with each other.
>
> *The FCC had a problem. They came to us and said, we have to move somebody; is there a place you can move them to.* They needed a relatively small portion of our spectrum to move. There were only two areas in which there was going to be an interference problem, as I understood it. We had to make the move nationally, however, because all of the equipment the military used was national equipment and it had to be useful anywhere.
>
> *The Commission had a problem. They asked if there was a way we could move, we took a look, we asked the constituents in the Defense Department if it was possible to do it, they said it was, we made a slight shift and it solved a problem.* There was no need for public notice or hearing as best we could tell. And *we were trying very hard to make sure that commitments the Commission made were able to be honored* and making sure that our national security needs were going to be met. There was no behind the scenes—I asked my staff to look into it and they did. . . .

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[22] Irving Testimony at 77-79.

MR. LARGENT. And yet on your Web site, you talk about that the NTIA has no spectrum reserves and it only uses what it needs to provide critical services to the public.

MR. IRVING. That is consistent.

MR. LARGENT. This spectrum that you took was not used for the public, this was used for two private companies that the spectrum was reallocated for.

MR. IRVING. *That is somewhat inconsistent—well, my statement is consistent. . . . I believe what we did was consistent. What we have always tried to do, we try to be accommodating.* I move—well, I don't move, my spectrum guys move people around every day to accommodate public sector and private sector uses. . . .

MR. LARGENT. So what you are saying is this is something you would have done for anybody. . . . [D]o you think that it is a good policy for the NTIA to have to make those kinds of shifts on the spectrum without notice or comment? I mean—

MR. IRVING. I don't think this is the problem. If the procedure—if somebody is questioning the procedures, I think what we did was both legal, lawful, ethical, and the right thing to do in order to avoid—I mean, one of the things I constantly hear from this committee and others, and I think you are right, is that because of regulatory lag, we are losing billions of dollars of economic activity. *We are trying to cut down regulatory lag. If you start expanding every decision we make with regard to a shift of spectrum into either a paper hearing or a hearing on the record, you are going to start seeing losses of billions of dollars of economic activity* because there is going to be a lag between the time we can move them and the time they ask for the move.[23]

The account outlined above seems to show that two companies — Teledesic and Teligent — had a spectrum interference problem that the FCC attempted to solve by approaching the NTIA. Mr. Irving twice asserted that it was *the Commission* that had the problem, and twice maintained that it was *the Commission which asked NTIA for help* in solving the problem. Moreover, NTIA brought in DoD to "make sure that commitments the Commission made were able to be honored."[24] Thus, in the resulting *24 GHz Order*, the FCC sought to resolve a private spectral

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23 *Id.*

24 *Id.* at 78.

dispute between Teledesic and Teligent, yet relied upon the "military affairs" exception to adopt the *Order* without notice and comment. As demonstrated above, there was no national security emergency. To the contrary, the FCC approached NTIA to resolve the Teledesic/Teligent spectral "problem."

BellSouth does not contest the fact that the FCC may invoke the national security exemption to the APA where one of the agencies entrusted with national security duties legitimately determines that national security interests justify prompt and decisive action by the FCC.[25] Nor does BellSouth deny that NTIA, as the agency that manages the spectrum needs of DoD, could legitimately cause the FCC to invoke the national security exemption where its national security interests required it. These conclusions are self-evident.

However, it is equally self-evident that NTIA may not legitimately cause the FCC to invoke the national security exemption where its national security interests are not at risk. Stated otherwise, NTIA may not trigger the national security exemption in order to resolve a spectrum dispute between two private parties — a situation described by Mr. Irving whereby NTIA "tr[ied] very hard to make sure that commitments the Commission made were able to be honored. . . ."[26]

It is also self-evident that the FCC may not recruit one of the agencies entrusted with national security duties to make a request which triggers the national security exemption. The privilege of invoking the national security exemption obviously resides with the agencies entrusted with protecting the security of the nation, and this privilege cannot be "loaned" to sister agencies.

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[25] Of course, the military affairs exemption would apply to clear the 18 GHz band, but would not extend to promulgating rules — without notice and comment — concerning the 24 GHz band.

[26] *Id.*

Yet in this proceeding, Mr. Irving's own testimony to a Congressional committee makes it crystal clear that the FCC was the driving force behind NTIA's request to clear the 18 GHz spectrum. Mr. Irving testified that "[the FCC] came to us and said, we have to move somebody; is there a place you can move them to."[27] He further testified that "[t]he Commission had a problem. They asked if there was a place we could move . . . "[28] Under these circumstances, the purported reliance on the national security exemption must fail. Any contrary result would render meaningless the APA and its mandate for open government and a reasoned decision-making process.

B. *Ex-Parte* Documents Also Confirm that the DEMS Reallocation Does Not Fall Within the APA's Military Affairs Exception

Ex Parte documents filed in this docket[29] reflect discussions between the FCC and Teledesic concerning the reallocation of spectrum in the 18 and 24 GHz bands well in advance of the first NTIA letter, dated January 7, 1997.[30] Although it is unclear exactly when private discussions between the FCC, Teledesic and Teligent began,[31] it is clear that substantial discussion occurred *prior* to the initial NTIA letter of January 7, 1997. For example, a December 6, 1996 cover letter mentions the concern of a "'gold rush' across the entire [24 GHz] band."[32] An attached

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27 *Id.*

28 *Id.*

29 On June 3, 1997, the International Bureau placed eight documents into the public file of this proceeding.

30 Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated January 7, 1997.

31 A December 6, 1996 cover letter from Teledesic to the FCC's International Bureau mentions a prior conversation between Teledesic and the FCC, and a December 5, 1996 memorandum appended to that cover letter concerns a prior proposal for the reallocation of the DEMS service from 18 GHz to 24 GHz.

32 *Id.*

memorandum to the President of Teledesic also discusses the technical impact of operating DEMS in the 24 GHz band at a time when the 24 GHz band was dedicated solely to military use. Notably, nowhere in the lengthy package is there any direct mention of NTIA, DoD, or military necessity.

Moreover, the *ex parte* package — which is made up entirely of correspondence between the FCC, Teledesic, and Teligent — is solely dedicated to the analysis of the 24 GHz band's technical parameters, and is arguably the basis for the *24 GHz Order's* one-page "DEMS Relocation and Technical Description" that was used to justify the FCC's grant to incumbent DEMS licensees of a four-fold increase on 24 GHz spectrum over that occupied at 18 GHz. Had this technical analysis been subject to a notice and comment proceeding, interested parties would have had the opportunity to closely examine the information and to provide alternative input that may have resulted in a different result.

C. *Bendix Aviation Corp. vs. FCC* Does Not Apply to Place the *24 GHz Order* Within the APA's Military Affairs Exception

In its opposition, Teligent argues that "Petitioners all but ignore the only applicable national security precedent," *Bendix Aviation Corp. v. FCC*.[33] BellSouth did not address *Bendix* in its petition for reconsideration because that case is not an APA case.[34] While the case contains a collateral reference to the APA and the military exception,[35] the case was not about the parameters of either. Rather, the issue in *Bendix* was, more broadly, whether the FCC may properly determine that a government need for use of spectrum may transcend non-government use of the frequencies.[36] The

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[33] Teligent Opposition at 11 (citing *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1959) (*"Bendix"*), *cert. denied sub nom. Aeronautical Radio, Inc. v. U.S.*, 361 U.S. 965 (1960)).

[34] *Accord* WebCel Petition for Reconsideration at 12.

[35] *Bendix*, 272 F.2d at 536 & n.8.

[36] *Id.* at 536.

court concluded that when the Office of Defense Mobilization ("ODM"), acting on behalf of the Executive Branch, represented that the reallocation of frequency bands for government use was essential to fill radio positioning requirements, the Commission was authorized to reassign frequencies and modify its rules in accordance with the government's request.[37]

In examining the Commission's authority to take such action, the court looked to Executive Order 10460 (June 16, 1953) and the Communications Act — *not the APA and the military affairs exception*:

> It remains, then, for us to examine the authority for the Commission's initial action. As pertinent here, we turn to Executive Order 10460 . . . .
>
> . . .
>
> [T]he action taken reflects compliance with the position of the Executive taken in the national interest. A reading of Executive Order 10460 demonstrates its harmonious accommodation to emergencies which Congress in writing the Communications Act must have foreseen. Thus tested, the Commission's action, pursuant to Sections 1, 4(i), (j), and 303(c), (f), (g) and (r) of the Act, was authorized.[38]

In fact, the APA is mentioned only in the initial fact section of the decision in one sentence and an accompanying footnote.[39] Accordingly, Teligent's argument that the *Bendix* decision is "the benchmark case"[40] involving the APA's military affairs exception cannot be sustained and its reliance thereon is misplaced.

Moreover, the *Bendix* decision is factually distinguishable from the present case. In *Bendix*, it was the ODM, acting on behalf of the Executive Branch, which approached the Commission for a reallocation of spectrum. In this proceeding, as demonstrated in Section I.A above by the

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37 *Id.* at 539-44.

38 *See id.* at 539-40.

39 *See id.* at 536 & n.8.

40 *See* Teligent Opposition at 11.

testimony of Assistant Secretary of Commerce Irving, the Commission approached NTIA seeking a reallocation to resolve a private dispute between Teledesic and Teligent, which was justified after-the-fact on national security grounds. Such action is contrary to *Bendix* and case law directly involving the APA military affairs exception — notably the *Independent Guard Association of Nevada v. O'Leary*[41] decision relied upon by BellSouth in its petition for reconsideration[42] — and must be reconsidered.

Because the *24 GHz Order* was not based on military security, and was adopted without public notice and rulemaking, it must be vacated. Mr. Irving's testimony before Congress confirms that the *24 GHz Order's* FCC-initiated spectrum allocation was designed to address a private dispute between Teledesic and Teligent concerning non-governmental usage of spectrum. Moreover, the incomplete *ex-parte* package reflects a tremendous amount of lobbying by non-defense related entities concerning the use of the 18 GHz band and the 24 GHz band. Accordingly, neither the FCC nor the opposing parties may inject an analysis of *Bendix* — in which the requisite military necessity was not questioned and in which *the Commission* properly responded to a request from the Executive Branch — into the instant situation.

II. BELLSOUTH HAS STANDING TO DISPUTE THE DEMS RELOCATION

Teligent also claims that Petitioners, including BellSouth, lack standing to challenge the Commission's *Order*.[43] According to Teligent, because Petitioners do not hold any 18 or 24 GHz authorizations, they cannot demonstrate any injury from the issuance of the *Order* in the absence of

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41 57 F.3d 766 (9th Cir. 1995).

42 *See* BellSouth Petition for Reconsideration at 7-9.

43 Teligent Opposition at 22.

notice and comment procedures.[44] While Teligent relies upon *SunCom Mobile & Data, Inc. v. FCC*[45] for the proposition that lack of licenses equates to a lack of standing, the case in fact turns upon whether a party seeking reconsideration can demonstrate "injury-in-fact" which is "'fairly traceable to the [Commission's] conduct.'"[46] It is beyond question that BellSouth has been injured by the Commission's *Order*, as shown below, and therefore has standing in this case.

BellSouth has been injured "in-fact" and has standing to dispute the relocation of incumbent DEMS licensees from the 18 GHz band to the 24 GHz band, for two reasons. First, the FCC has given more spectrum to two of BellSouth's local telephone bypass competitors — Teledesic and Teligent — than they had before. Teligent and BellSouth have directly competing wireline based telephone services in Atlanta, Georgia; Miami, Florida; and Tampa, Florida, and Teledesic has the potential to compete against BellSouth by providing telephone and Internet services in a number of markets.[47] The Supreme Court has held, in *Clarke v. Securities Indus. Ass'n,* that the alteration of competitive conditions has a probable economic impact which satisfies the "injury-in-fact" test.[48] Moreover, a party that is "likely to be financially injured" by an agency action has standing to challenge that action.[49] Therefore, because the FCC's order has enhanced the economic position of two of BellSouth's direct competitors to its detriment, BellSouth has standing in this case.

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44 *Id.*

45 87 F.3d 1386 (D.C. Cir. 1988).

46 *Id.* at 1387 (*citing Brandon v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1992)).

47 *See, e.g.,* Mike Mills, *Firms Ask FCC to Help Settle Airwaves Dispute; Wireless Telephone, Internet Services Planned*, The Washington Post, Mar. 12, 1997, at C10.

48 479 U.S. 388, 403, 397 & n.13 (1987).

49 *FCC v. Sanders Brothers Radio Station,* 309 U.S. 470, 477 (1940).

Second, the FCC has allocated the entire 24 GHz band for private use without giving BellSouth the opportunity to participate in the allocation, or bid for licenses in the spectrum. The D.C. Circuit recently held that "injury due to lack of opportunity to compete . . . gives appellant standing,"[50] and has previously held that "actual *or potential* license applicants" would fall within the class affected by the FCC's "hard look" rules, such that they would be "aggrieved and thus would have standing to challenge those rules."[51] Accordingly, BellSouth also has standing to challenge the Commission's *Order* because it has been precluded from competing, or not been given the opportunity to comment on the potential for competing, with DEMS licensees on 24 GHz frequencies.

CONCLUSION

BellSouth reiterates that the *24 GHz Order* in this proceeding was promulgated without notice and comment in violation of Section 553 of the APA and should be vacated immediately. Any action subsequently taken must comport with the notice and comment procedures of the APA and should employ competitive bidding. The public interest compels such action because the Commission's allocation of spectrum in the 24 GHz band will result in a windfall to incumbent licensees. The failure to employ competitive bidding procedures as required by Section 309(j) of the Communications Act may result in untold financial loss in the form of lost auction revenues to the U.S. Treasury as well as lost bidding opportunities. BellSouth requests expeditious action since the *Modification Order* has already been released authorizing construction. BellSouth has also

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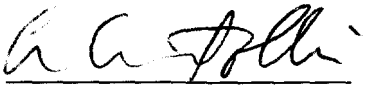
[50] *Dynalantic Corp. v. Department of Defense,* No. 96-5260, slip op. at 7-13 (D.C. Cir. June 10, 1997).

[51] *JEM Broadcasting Co. v. FCC,* 22 F.3d 320, 326 (D.C. Cir. 1994).

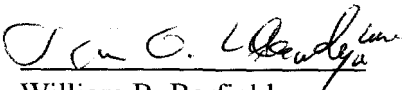
asked that the Commission freeze the effectiveness of that order pending resolution of the instant issues in a separately-filed petition for reconsideration of the *Modification Order*.

Respectfully submitted,

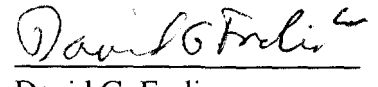
BELLSOUTH CORPORATION

By: 

L. Andrew Tollin
Michael Deuel Sullivan
Craig E. Gilmore
Jennifer Ann Burton
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Ave., N.W.
Washington, D.C. 20006
(202) 783-4141



William B. Barfield
Jim O. Llewellyn
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610
(404) 249-4445



David G. Frolio
BELLSOUTH CORPORATION
1133 21st Street, N.W., Suite 900
Washington, D.C. 20036

Its Attorneys

July 18, 1997

CERTIFICATE OF SERVICE

I, Linda K. Chalfant, do hereby certify that copies of the foregoing "BellSouth Reply" were served by U.S. first-class mail, postage prepaid, on this 23rd day of July 1997, upon the following:

*Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

*Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

*Mr. Dan Phythyon
Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, N.W., Room 808
Washington, DC 20554

*Mr. Fred Thomas
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W., Room 429
Washington, DC 20554

*Chris Murphy
International Bureau
Satellite Policy Branch
Federal Communications Commission
2000 M Street, N.W., Room 579
Washington, DC 20554

*Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

*Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

*Mr. Richard Smith
Chief
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W., Room 412
Washington, DC 20554

*Mr. Rodney Small
Office of Engineering and Technology
Federal Communications Commission
1919 M Street, N.W., Room 433
Washington, DC 20554

*Mr. F. Ronald Netro
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, DC 20554

Mark A. Grannis
Kent D. Bressie
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Jeffrey H. Olson
Robert P. Parker
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Street, N.W.
Washington, D.C. 20036

Jay L. Birnbaum
Antoinette Cook Bush
Anthony E. Varona
Jeffry A. Brueggeman
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

Laurence E. Harris
David S. Turetsky
Teligent, L.L.C.
11 Canal Center Plaza
Suite 300
Alexandria, VA 22314

*William E. Kennard
General Counsel
Federal Communications Commission
1919 M Street, NW
Room 614
Washington, DC 20554

*David H. Solomon
Federal Communications Commission
1919 M Street, NW
Room 614
Washington, DC 20554

Linda K. Chalfant

Linda K. Chalfant

* Hand Delivery